

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET N.W., 6TH FLOOR

WASHINGTON, D.C. 20006

May 30, 2000

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

EARL BEGLEY, employed by
MANALAPAN MINING CO., INC.

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Docket No. KENT 99-233
A.C. No. 15-16318-03656 M

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On May 25, 2000, the Commission received via facsimile transmission a petition for discretionary review from Earl Begley, employed by Manalapan Mining Co., Inc., challenging a decision issued by Administrative Law Judge Avram Weisberger on April 19, 2000. In his decision, Judge Weisberger found that Begley had violated section 317(c) of the Mine Act, 30 U.S.C. § 877(c), by carrying smoking materials underground, and ordered Begley to pay a civil penalty of \$250. 22 FMSHRC 537, 540-43 (Apr. 2000) (ALJ).

The judge's jurisdiction in this matter terminated when his decision was issued on April 19, 2000. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Begley's petition was received by the Commission on May 25, 2000, six days past the 30-day deadline. Under the Commission's Procedural Rules, the filing of a petition for discretionary review is effective upon receipt. 29 C.F.R. § 2700.70(a).

The Commission has entertained late-filed petitions for discretionary review where good cause has been shown. *See, e.g., DeAtley Co.*, 18 FMSHRC 491, 492 (Apr. 1996) (excusing late filing of petition for discretionary review where operator's predecessor failed to inform operator of unconsummated settlement agreement); *McCoy v. Crescent Coal Co.*, 2 FMSHRC 1202, 1204

(June 1980) (vacating judge's order of dismissal and finding good cause where petitioner was pro se during part of the proceedings, subsequently-retained counsel obtained judge's decision only 10 days prior to deadline for petition, and petition was mailed on 30th day). In circumstances in which a hearing on the merits has taken place, the Commission has rejected a late-filed petition for discretionary review where the petitioner has offered no explanation for the late filing. See *Dykhoff v. U.S. Borax Inc.*, 21 FMSHRC 976, 977-78 (Sept. 1999); *Duval Corp. v. Donovan*, 650 F.2d 1051, 1054 (9th Cir. 1981); *Sunbeam Coal Corp.*, 2 FMSHRC 775 (Mar. 1980). But see *Dykhoff v. U.S. Borax, Inc.*, 21 FMSHRC 1279, 1280-81 (Dec. 1999) (reopening proceedings where pro se miner filed motion for reconsideration explaining he mistakenly believed he had 40 days to file his petition for discretionary review).

Here, Begley, who is represented by counsel, has availed himself of the opportunity to have his case heard by a judge. He also offers no explanation for his failure to timely submit a petition for discretionary review. Thus, Begley has failed to show "good cause," excusing his late filing. Accordingly, we reject this petition as untimely. See *Duval Corp.*, 650 F.2d at 1054 (upholding finding of no good cause where counsel obtained judge's decision 24 days prior to deadline for filing petition, and petition was mailed within 30 days of judge's decision but received by the Commission one day after filing deadline); *Sunbeam*, 2 FMSHRC at 775 n.1 (dismissing petition as untimely where good cause for late filing was neither claimed nor shown in the petition).

For the foregoing reasons, Begley's petition for discretionary review is denied as untimely filed.¹

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

¹ Commissioner Marks would grant Begley's petition.

Distribution

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